

Enclosures

Petitioner List

Water Permit Application No. 2850-2, Elk Mountain Water Users Association Inc.
November 9, 2022

PETITIONERS

Daniel Norman Stearns
25499 Dewey Rd
Edgemont SD 57735

Dalton Stearns
10321 Two Track Trl
Edgemont SD 57735

Travis Paulton
10693 Pass Creek Rd
Edgemont SD 57735

William and Susan Paulton
10666 Pass Creek Rd
Edgemont SD 57735

Jim and Charel Pitts
25385 Gillette Canyon Rd
Newcastle WY 82701

Late-Filed Petitioner
Tomas & Eraclio Martinez
25663 Dewey Rd
Edgemont SD 57735

RECEIVED

DEC 27 2022

OFFICE OF
WATER

STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF WATER)	PROCEDURAL
APPLICATION NO. 2850-2, Elk)	AND SCHEDULING ORDER
Mountain Water Users Association,)	
Inc.)	

Upon consideration of Motion for Procedural and Scheduling Order filed by the Chief Engineer and the South Dakota Department of Agriculture and Natural Resources Water Rights Program, the following deadlines shall be imposed in preparation for the hearing of this matter before the Water Management Board on March 7-8, 2023.


1. All attorneys who will be representing any party at the formal contested case proceeding shall file a Notice of Appearance in this matter. While individuals may appear *pro se* at hearings before the Water Management Board, all entities must be represented by counsel. Furthermore, all non-resident counsel must be able to demonstrate compliance with the *pro hac vice* requirements of SDCL 16-18-2.
2. Each party must disclose in writing the names of all expert witnesses it intends to call as a witness at the contested case hearing no later than January 27, 2023. Each party must include in this submission copies of any *curricula vitae* as well as copies of any expert report prepared by the expert witness. If the expert has not prepared a

report, the party must disclose a summary of the anticipated testimony the expert will provide and the methodology the expert utilized in coming to those conclusions.

3. On or before February 21, 2023, each party must disclose in writing the names of each witness the party anticipates calling to testify during the hearing.
4. Each party must provide to all other parties a list identifying all exhibits that party intends to offer as evidence in its case in chief at the hearing and copies of said exhibits on or before February 21, 2023. The copies may be provided by electronic means. A copy shall also be provided to Ron Duvall, DANR Water Rights Program, 605-773-3352 or at Ron.Duvall@state.sd.us.
5. Each party must mark in advance of the hearing all exhibits the party intends to introduce at the hearing in its case in chief. The applicant shall mark their exhibits with the designations A through Z. The Program shall use the block of exhibit numbers 1-100. The remaining parties shall be required to contact Ron Duvall, DANR Water Rights Program, 605-773-3352 or at Ron.Duvall@state.sd.us, to obtain a block of exhibit numbers.
6. Each party to the contested case proceedings must prepare and provide a sufficient number of copies of exhibits for use at the hearing for use by the Board, its counsel, and court reporter, and sufficient copies for all parties participating in the contested proceedings.

7. All original pleadings be sent by regular first-class mail to Ron Duvall, DANR Water Rights Program, Foss Building, 523 E. Capitol Avenue, Pierre, South Dakota 57501-3182. Parties shall also be required to serve copies of all pleadings on all other parties, including the Board Chairman, and upon the Board's Counsel, Assistant Attorney General David McVey.

Dated this 9th day of December 2022.



Rodney Freeman, Prehearing Chair
Water Management Board

Procedure for Hearings before the Water Management Board

The Water Management Board's function is to regulate and control the development, conservation, and allocation of the use of water according to the principles of beneficial use and priority of appropriation. In this role, the Water Management Board conducts contested case hearings on water right permit applications. This document is intended to acquaint participants in hearings of general procedures before the Board.

The Board is a citizen board consisting of seven members appointed by the Governor. They are from varying backgrounds and locations around the state. The Board has meetings approximately every two months.

South Dakota codified laws (SDCL) and administrative rules (ARSD) govern water rights. The laws and rules are available online at <https://sdlegislature.gov/>. Laws of interest include SDCL Chapters 1-26, 46-1, 46-2, 46-2A, 46-4, 46-5 and 46-6. Administrative rules to review are ARSD 74:02:01.

Individuals may represent themselves in a contested case before the Board or may be represented by legal counsel. However, an organization, association, partnership, corporation, etc., must be represented by an attorney. Attorneys that intend to participate in the hearing must mail a Notice of Appearance to all other parties. Non-resident attorneys must be able to demonstrate compliance with the requirements set forth SDCL 16-18-2 to practice in South Dakota.

Burden of Proof

An applicant for a water right permit has the burden of proving that the Water Management Board should approve the application and issue the permit. The applicant must therefore be prepared to present the permit application and the proposed operation to the Board at a contested case hearing. This burden then switches to the petitioning parties to prove their case. Do not rely on the Water Rights Program to carry the burden of proof. Although the Chief Engineer makes a recommendation to the Board, this recommendation is in no way binding upon the Board. While a Water Rights expert will present their report and be subject to questioning by the Board and parties on the application, Water Rights is not an advocate for your position.

SDCL 46-2A-9 sets forth the four criteria that must be present to approve an application. They are:

1. A reasonable probability that unappropriated water is available for the proposed use;
2. The proposed diversion will not unlawfully impair existing rights;
3. The use is a beneficial use; and
4. The use is in the public interest.

Procedure

You or your legal counsel need to be at the hearing to present your position in a contested case hearing.

The Board Chairman runs the hearing. Address all questions and objections to the Chairman for a ruling. In some instances, the Board will appoint a hearing officer to preside over prehearing conferences and prehearing motions. An attorney from the Attorney General's office is seated with the Board to provide

legal advice to the Board. In addition, the Water Rights Program is represented by legal counsel. This is a legal proceeding so expect to swear an oath to tell the truth when you testify.

Contested case hearings are conducted pursuant to procedures outlined in SDCI, ch. 1-26. Only parties of record can participate in the hearing by presenting testimony, calling witnesses, or cross-examining witnesses. Parties include the applicant and those individuals that have filed a petition as set forth in the public notice. The following procedure is followed:

1. Opening statements (parties may waive their opening statement)
 - a. Applicant
 - b. Water Rights
 - c. Petitioners and Intervenors
2. Evidentiary hearing
 - a. Water Rights – staff present their report and the Chief Engineer's recommendation
 - b. Applicant (applicant's opportunity to present testimony and call witnesses)
 - c. Petitioners and Intervenors (opportunity to present testimony and call witnesses)

Be prepared to explain your position on the application. Although the Board members have a great deal of expertise, don't presume they know anything about your issue before them. If you're the applicant, state what the proposed project is, the location of the project, timelines for completed the project and its benefits. If you are an opponent to the application, explain where you live in proximity to the proposed project and the adverse impact of the proposed project.

Parties may call witnesses on their behalf. The Board oftentimes hears testimony from technical experts, neighbors, or other witnesses regarding the proposal. Written endorsements are subject to the hearsay rule at the time of the hearing since the person cannot be cross-examined. Written comments will usually be allowed only if there is no objection from any other party.

Upon the conclusion of any witness's testimony, Board members may ask questions of the witness and all parties will be afforded an opportunity in an orderly manner to cross-examine the witness regarding their testimony. Cross-examination is your opportunity to ask questions of the witness related to their direct testimony. It is not the appropriate time for you to provide your testimony.

3. Rebuttal. Parties may be afforded an opportunity to present testimony rebutting a prior witnesses' testimony. Witnesses are again subject to cross-examination but only related to their rebuttal testimony.
4. Closing arguments (summation of your position)
 - a. Applicant
 - b. Water Rights
 - c. Petitioners and Intervenors
5. Board decision. The decision-making process occurs in public in front of all concerned and on the record. Normally, the Board limits discussion to its members but may call on witnesses,

attorneys, or parties to clarify a point. Upon making a verbal decision, the Board will direct either the prevailing party or Water Rights Program's staff attorney to prepare findings of fact, conclusions of laws and a final decision that will be considered at the Board's next meeting. The findings are a record of the facts considered by the Board. In the event the Board's decision is appealed to court, the findings reflect the facts considered by the Board to arrive at a decision. The non-prevailing party may waive their rights to findings if they are satisfied the Board addressed their concerns or have no intention of appealing the decision.

Although hearings may sometimes be considered informal, it is evidentiary hearing. Attorneys cannot testify or answer factual questions, cross-examination is allowed, and copies of exhibits must be available for opposing counsel and other parties.

Ex-parte Communication

It is improper for any party to a pending application or contested case proceeding to contact Board members prior to the hearing. To do so is ex-parte communication with the likely result being the Board member excusing himself from the proceeding. The Board is very careful to avoid even the appearance of discussing a contested case hearing that will come before it. Situations do arise where a party requests to have a Board ruling on a motion prior to the evidentiary hearing. If an applicant or party has an issue he wishes to raise prior to the hearing, please contact the Water Rights Program and they will put you in contact with either the Board's attorney or the Water Rights Program attorney.

Exhibits

Exhibits are pictures, maps, or documents you wish the Board to consider in conjunction with your testimony. Used effectively, exhibits greatly increase the interest and knowledge of the Board. Please have all exhibits you intend to present marked in advance of the hearing. Contact the Water Rights Program to find out how you should number your exhibits. Provide enough copies of each exhibit for the Board, Water Rights Program, opposing counsel and other parties. The exchange of exhibits by parties prior to the hearing is encouraged. Be aware that someone may object to admission of an exhibit. The Board Chairman will rule whether the exhibit is admissible. All exhibits become part of the record and will not be returned.

Transcript

A court reporter is present at all contested case hearings. A party wishing to have a transcript of the hearing should make their own arrangement with the court reporter. Water Rights will tape the proceeding and will prepare minutes of the hearing.

Appeal of Board's Decision

South Dakota statutes provide that decisions of the Board may be appealed to the courts. Notice of appeal of the Board's decision must be filed within thirty days from when the signed findings of fact, conclusions of law and final decision is mailed to parties. The notice of appeal must be in accordance with procedures established in SDCL 1-26-31.

The best advice is to come to the hearing prepared! If you have question regarding the hearing process, please contact Ron Duvall, Water Rights Program at (605) 773-3352.

CERTIFICATION

The undersigned hereby certifies under the penalty of perjury that a true and correct copy of a Notice of Entry of Order dated January 12, 2023; a Procedural and Scheduling Order signed January 9, 2023; both regarding Water Permit Application No. 2850-2 – Elk Mountain Water Users Association Inc.; and informational document entitled “Procedure for Hearings before the Water Management Board,” was served upon the following by enclosing the same in envelopes with first class postage prepaid and affixed thereto, and depositing said envelopes in the United States mail on January 12, 2023.

Susan Anderson
Elk Mountain Water Users Assn. Inc.
PO Box 6062
Custer SD 57730

Robert J. Galbraith, Attorney
Nooney & Solay, LLP
PO Box 8030
Rapid City SD 57709-8030

Petitioners as follows:

Daniel Norman Stearns
25499 Dewey Rd
Edgemont SD 57735

William and Susan Paulton
10666 Pass Creek Rd
Edgemont SD 57735

Dalton Stearns
10321 Two Track Trl
Edgemont SD 57735

Jim and Charel Pitts
25385 Gillette Canyon Rd
Newcastle WY 82701

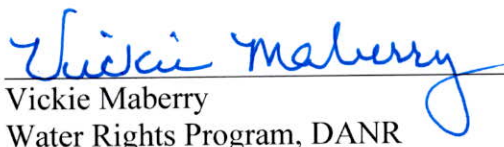
Travis Paulton
10693 Pass Creek Rd
Edgemont SD 57735

Late-Filed Petitioner
Tomas & Eraclio Martinez
25663 Dewey Rd
Edgemont SD 57735

Above also Sent Inter-office to:


Ann Mines Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

David McVey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501


Vickie Maberry
Water Rights Program, DANR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this _____ day of January 12, 2023.


Karen Schlaak
Notary Public
My Commission expires April 1, 2025

